

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

her duties as requiring heavy repetitive lifting, describing some of the objects as 5-gallon buckets of products, including soap. Claimant stated that she began feeling symptoms in her right shoulder at work in June 2003, while lifting buckets of soap. Claimant did not initially mention the shoulder symptoms to anyone at work. A few days later, however, claimant alleges she did mention her shoulder problems to her supervisor, Jutta Titterton. Claimant described this as being sometime in late June 2003. Claimant was not sure if she stated that her shoulder problems were work related.

Claimant continued working for respondent through August 16, 2003. Claimant testified that on August 16, she had developed such severe shoulder problems that she was unable to finish the last four hours of her shift and had to go home early. The next day, August 17, claimant did not work. When claimant contacted respondent, she was advised to talk to personnel. She was told on August 18 that she was being fired for job abandonment.

Claimant first sought medical treatment on August 16, but the medical records associated with that visit were not part of the record. Claimant also went to Dr. Gardner on August 18. But again those medical records were not made available to the Administrative Law Judge or the Board. The first medical records in evidence are the October 14, 2003 records from Occupational Health Services, which discuss claimant's right shoulder problems beginning in June and being caused by repetitive lifting of heavy boxes.

Claimant testified on direct examination that her shoulder problems worsened to the point where she was unable to finish the last four hours of her shift on August 16. However, on cross-examination, claimant acknowledged that while continuing to work from June through August of 2003, her pain stayed "about the same." Claimant acknowledged she did not ask for any type of medical care in June 2003.

Respondent contends that claimant failed to give notice of accident in June 2003, within ten days as is required by statute, and, further, that claimant failed to prove that she suffered a series of traumatic accidents through her last date worked.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

K.S.A. 44-534a lists specific issues which are appealable to the Board upon appeal from a preliminary hearing. Those issues include whether the employee suffered accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

apply. Those issues are considered jurisdictional and subject to Board review from an appeal from a preliminary hearing.

The date of accident is not normally considered an issue which can be appealed from a preliminary hearing, as it is a non-jurisdictional issue in most situations. In this instance, however, respondent's notice argument is directly connected to the appropriate date of accident. Therefore, in order to decide notice, which is one of the issues listed under K.S.A. 44-534a, the Board must also determine the appropriate date of accident. Date of accident for overuse, repetitive trauma injuries has long been disputed in workers' compensation litigation. The complexities of determining the date of accident involving a repetitive use injury are simplified if the date from which the compensation flows can be consistently determined.<sup>2</sup> In this instance, claimant has alleged a specific onset in June 2003, which respondent argues would be the appropriate date of accident. However, claimant also testified on direct examination that her shoulder continued to worsen to the point where, by August 16, 2003, she was in such pain, she was unable to complete the last four hours of her shift.

The Board acknowledges that claimant, on cross-examination, described pain which did not go away and which remained about the same. However, those responses were to leading questions on cross-examination by respondent's attorney. While leading questions are appropriate on cross-examination, they do, nevertheless, tend to influence the answers of the witness. The Board finds claimant's direct examination testimony regarding the difficulties associated with her job through August 16, 2003, are persuasive. The Board, therefore, finds the Administrative Law Judge's determination that claimant suffered accidental injury through August 16, 2003, her last day worked, is appropriate for preliminary hearing purposes.<sup>3</sup> Therefore, that will be deemed as the date of accident, and the notice provided by claimant on August 18, 2003, meets the requirements of K.S.A. 44-520, that notice be provided within ten days of the date of accident.

The Board acknowledges that the record created at preliminary hearing may be somewhat sparse and additional information may help to clarify this issue, but, for preliminary hearing purposes, claimant is deemed to have provided timely notice of accident.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated November 6, 2003, should be, and is hereby, affirmed.

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<sup>2</sup> *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

<sup>3</sup> *See Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2004.

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BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant  
Kip A. Kubin, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director